

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, MD 20850
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Case No. S-2031-A

**PETITION OF SPECTRASITE COMMUNICATIONS, INCORPORATED
(RICHARD CONNER RILEY & ASSOCIATES, AGENT)**

(Hearing held January 9, 2002)

OPINION OF THE BOARD

(Effective date of Opinion, April 15, 2002)

Case No. S-2031A is a petition filed pursuant to Section 59-G-2.43 (telecommunications facility) of the Zoning Ordinance for Montgomery County (Chap. 59, Mont. Co. Code 1994, as amended, for modification of an existing special exception approved by the Montgomery County Board of Appeals in Case No. S-2031 on May 3, 1994. The original special exception on the subject property allowed for the construction of a monopole for a maximum height of 183 feet and this petition requests that the height be increased to 197 feet. The public hearing was limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to discussion of those aspects of the special exception use that are directly related to those proposals.

Pursuant to Section 59-A-4.41 of the Zoning Ordinance, the Board held a hearing at 2:00 p.m. on January 9, 2002. Russell W. Shipley, Esq. and Janet Brown, Esq. appeared on behalf of the Petitioner. Petitioner's witnesses included a representative of the Petitioner and the Petitioner's landplanner, Thomas Kieffer. In view of the fact that the case was unopposed, the Petitioner submitted the requested modification based upon the Technical Staff Report (Exhibit No. 17) and the previous decision of the Montgomery County Board of Appeals in Case No. S-2031 (Exhibit No. 17, A-7). The record includes the recommendation of the Department of Information Systems and Telecommunications in approving this modification (Exhibit No. 17, A-6). The Petitioner called Mr. Kolman Henri Edoh of Sprint PCS as an expert witness in the field of radio frequency engineering.

Decision of the Board: Special Exception Modifications **Granted**, subject to conditions enumerated below.

EVIDENCE PRESENTED TO THE BOARD

1. The subject property is described as part of Parcel 48-14705, Sugarland Road, Poolesville, Maryland, the property owned by David Weitzer. The subject site is zoned RDT (rural density transferred). Subject site is known as "The Weitzer Property" and consists of approximately 212 acres and is primarily used for agricultural purposes. The area of the special exception consists 2500 feet on the River Road side of the property. The existing telecommunications facility is accessed by a 12-foot wide gravel driveway from River Road.
2. The Technical Staff of the Montgomery County Planning Board reviewed this petition for modification and submitted a written report and recommendation dated January 3, 2002, recommending approval with conditions (Exhibit No.

17).

3. The Montgomery County Tower Coordinator, Department of Information Systems and Communications ("Tower Coordinator") recommended approval of this modification (Exhibit No. 17, A-6).
4. Mr. Kolman Henri Edoh of Sprint PCS, an expert in the field of radio frequency engineering (Exhibit No. 21, Resume), testified regarding coverage maps (Exhibit No. 22) showing the existing unreliable state of Sprint PCS coverage in the site area and the improved reliability of coverage (Exhibit No. 23) that would be achieved by Sprint PCS' colocation on the proposed extension to the existing monopole. Mr. Edoh testified that reliable coverage could not be achieved by collocating at any available elevation on the existing monopole at its current height and that the proposed extension to the height of the monopole is necessary in order to allow continuity of Sprint PCS coverage along River Road and to neighboring wireless telecommunications sites that are part of the Sprint PCS wireless network. Mr. Edoh stated that the proposed extension would eliminate the need to construct a new monopole. The Tower Coordinator recommended approval of Sprint PCS' colocation on the proposed extension to the monopole. This recommendation was adopted by the Tower Committee (Exhibit No. 20).
5. Petitioner submitted a Structural Analysis Report (Exhibit No. 22) to demonstrate the structural capability of the monopole to support the proposed extension and Sprint PCS' installation. This report was submitted to and reviewed by the Tower Coordinator (Exhibit No. 20).
6. No communications in opposition to this proposed modification of the special exception were received and no one appeared in opposition at the hearing.
7. The proposed equipment building is to be a plain rectangular structure of rather diminutive proportions (12'x26'x11' high) (Exhibit No. 17). It will be constructed of a durable masonry material similar to the existing equipment building. Although not residential in appearance, it will not be visible from any adjoining properties, nor will it be visible from the River Road, as with the existing equipment building.
8. The proposed telecommunications facility will be unmanned, but will be visited by maintenance personnel from time to time. The site plan illustrates that the existing 12' wide gravel access drive will provide vehicular access to the facility. Double leaf gates opening to 12' wide provide access inside a 50' by 50' area secured by an 8' high chain link fence topped with three strands of barbed wire (Exhibit Nos. 5 - 7). Maintenance personnel will be able to drive their vehicles into the secured area and perform their work on the proposed facilities, the same as for the existing facility. They will be able to turn their vehicles around and then drive forward away from the facility, as turnaround (back-up) space is available inside the compound. The low intensity and open character of this activity, as well as the negligible amount of traffic and parking demand of the facility will have a negligible impact on the neighborhood.
9. The proposed telecommunication facility expansion will fit into the existing patterns of agricultural uses that have evolved in the area. The site of this facility is just off an existing farm field surrounded by woodlands and other agricultural fields. Adjacent agricultural fields and other intervening woodlands will remain unaffected (Exhibit No. 17).

10. The existing telecommunication facility, as modified based on this petition, will be virtually inaccessible to all but the cellular telephone maintenance personnel. The remote nature of the facility's location also contributes to it not being a safety hazard. Access is by means of a locked gate of the same height as the fence. The maintenance building is designed to be secure and the monopole, similarly, is not climbable. The remote nature of the facility's location also contributes to it not being a safety hazard.
11. The existing facility is located in a remote location that is not visible from any public road or adjoining property. Adding landscaping, screen planting and/or fencing in this particular case, would be unnecessary.
12. This petition is to increase the number of carriers on the existing monopole from one to three. The proposed monopole will be capable of supporting three carriers.
13. Mr. Shipley indicated at the beginning of the hearing that the Petitioner agrees with all of the conditions proposed by the Technical Staff Report and Recommendation (Exhibit No. 17).

FINDINGS OF THE BOARD

General Conditions

Sec. 59-G-1.2. Conditions for granting.

59-G-1.2.1. Standard for evaluation.

A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operation characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use and adverse effects created by unusual characteristics of the site.

The inherent adverse effects of a monopole transmission tower include its height and visibility. The inherent adverse effects are mitigated in this location because the property is located on a 212-acre farm in a rural area of Poolesville. The subject special exception site is heavily screened by deciduous trees and evergreen material between the location of the existing special exception, as proposed to be modified, and River Road. The existing tower has been on the site for approximately 4 years.

59-G-1.21. General conditions

- (a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

- (1) *Is a permissible special exception in the zone.*

The property is in the RDT (rural density transfer) zone, and the tower and support structures are permissible special exceptions in the zone. The table in section 59-C of the Zoning Ordinance indicates that “Public utility buildings, public utility structures and telecommunications facilities” and “radio and television broadcasting stations and towers” are permissible special exception uses in the RDT zone.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

The tower and support structures are permissible special exceptions in the zone. As noted below, the use will be compliance with the standards and requirements set forth in 59-G-2.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan thereof adopted by the Commission. Any decision to grant or deny special exception must be consistent with a recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board’s technical staff in its report on a special exception concludes that the granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The proposal is consistent with the general plan for the physical development of the district, including the current master plan for the area which is the 1980 Functional Master Plan for the Preservation for the Preservation of Agriculture and Rural Open Space, as updated. This master plan designates the subject property being in the “Agricultural Reserve (RDT)”. As mentioned above, a telecommunication facility is a permissible special exception use in the RDT zone.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.*

The existing telecommunication facility is fairly isolated, being located approximately 209 feet from River Road, the nearest public street, and separated from the road by woodlands containing trees up to 100 feet in height. The general character of the neighborhood is one of extensive wooded tracts alternating with rolling agriculture fields and an occasional home site. No homes are visible from the site.

The top of the 197-foot high monopole will protrude above the 100' high existing tree line. However, given the significant distances that separate the proposed facility from adjoining properties and the public road, and the dense woodlands that grow down to River Road. the perception of the tower in the distance will be minimal.

The Board finds that this modification to an existing telecommunication facility will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

This modification will not affect the use, peaceful enjoyment, economic value, development of surrounding properties for the use, value, development of surrounding properties or the general neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The proposed facility expansion will cause no noise, vibrations, fumes, odors, dust or glare. This unmanned facility, as modified, will continue to have minimal maintenance related activity associated with it, and will not be objectionable in nature.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature. Special exception uses in accord with the recommendations of a master or sector plan are deemed not to alter the nature of an area.*

According to the Technical Staff, there are no other special exceptions for this type of use within the neighborhood of the subject property.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.*

An 8-foot high chain link fence topped with three (3) strands of barb wire will enclose the 50x50 compound. Access is by means of a locked gate of the same height as the fence.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*
 - (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

As this proposal is for telecommunication facilities, subdivision is not required per Section 50-9(g) of the Montgomery County Code.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental*

effect on the safety of vehicular or pedestrian traffic.

The proposed modification has been designed to operate automatically and unmanned. There will be no need for water or sewer service and no special requirement for schools, storm drainage, police, fire protection, public roads and other public facilities. The use is unmanned and will require only occasional visits by maintenance personnel, which will result in a minor and inconsequential increase in traffic on existing roads. Access to the compound will remain as it is today, with no new access points proposed.

59-G-1.22. Additional Requirements.

- (a) The Board, the Hearing Examiner, or the District Council, as the case may be, may add to the specific provisions contained in this Article, any others necessary to protect nearby properties and the general neighborhood.*
- (b) Pursuant to guidance by the Planning Board, the Board, the Hearing Examiner, or the District Council, as the case may be, may require a special exception to comply with the provisions of Division 59-D-3, "Site Plan", if:*
 - (1) The property is in a zone requiring site plan approval or,*
 - (2) The property is not in a zone requiring site plan approval, but the Planning Board has indicated that site plan review is necessary to regulate the impact of the special exception on surrounding uses because of disparity in bulk or scale, the nature of the use, or other significant factors.*

Site plan is neither required by the zone nor indicated as necessary by the Technical Staff or the Planning Board.

59-G-1.23 General Development Standards.

- (a) Height Limitations. Special exceptions are subject to the height limitations of the zone in which the special exception is located, except that the Board may approve a structure exceeding the height limits of the relevant zone if, in the opinion of the Board, adjacent residential development and uses will not be adversely affected by development in accordance with the following:*

** * * * **

- (3) Section 59-G-2.43, title "Public Utility buildings and Public Utility Structures," or*

The modification request complies with the requirements of Section 59-G-2.43.

** * * * **

- (c) Area, frontage and setback requirements. Whenever in division 59-G-2 no specific area, frontage and setback requirements are specified, then the area, frontage and setback requirements in the applicable zone shall apply; provided, that in the following special exception cases the board shall be authorized to waive the requirement for a minimum frontage at the street line if it finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

* * * * *

- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations.*

The parcel in question has adequate frontage in the RDT zone and, therefore, no waiver or frontage requirements under section 59-G-1.23 is necessary by the Board.

- (d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that is in conflict with the preliminary forest conservation plan.*

No forest conservation plan is required in this case.

- (e) *Should a special exception application, approved by the Board, be inconsistent with the approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that is determined by the Planning Board and department to be consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department determine that the required revisions can be evaluated as part of the final water quality plan review.*

This special exception modification is not within a special protection area, and therefore not subject to the submission of a water quality plan. The provision of 59-G-1.23 requiring consistency with any approved preliminary water quality plan is inapplicable.

- (f) *Signs. The display of a sign must comply with the requirements established in Article 59-F of this chapter.*

The Petitioner does not propose any signs on the site.

59-G-1.26. Exterior appearance in residential zones.

Structures to be constructed, reconstructed or altered pursuant to special exceptions in residential zones must, whenever practicable, have the exterior appearance of residential buildings of the type otherwise permitted, have the exterior appearance of residential buildings of the type otherwise permitted and must have suitable landscaping, screen planting and fencing wherever deemed necessary by the board, the hearing examiner or the district council.

The existing and proposed support structures are designed so that they will not be visible from any street or public thoroughfare.

Section 59-G-2.43. Public utility buildings public utility structures, and telecommunication facilities.

- (a) *A public utility building or public utility structure, not otherwise permitted, may be allowed by special exception. The findings of this subsection (a) do not apply to electric power transmission or distribution lines carrying in excess of 69,000 volts. which are regulated by subsection (f) below. For other buildings*

or structures regulated by this section, the board must make the following findings:

- (1) The proposed building or structure at the location selected is necessary for public convenience and service.*

The proposed modification is necessary for public convenience and service. Mobile telephone service has become a convenience of modern day living that more and more people are demanding. This modification is necessary to meet this increasing demand, both in terms of the extent of the area that is covered by Sprint and in terms of the quality of reception and transmission of cellular phone calls. Additionally, the proposed modification will allow for facilities by additional providers in this location.

- (2) The proposed building or structure at the location selected will not endanger the health and safety of workers and resident in the community and will not substantially impair or prove detrimental to neighboring properties.*

The proposed modification increasing the monopole height is to be constructed in accordance with all applicable safety standards. In view of the fact that the site of the special exception is in a remote location, it is located on a 212-acre farm, is a small portion (50'x50') of a 2+ acre lot, is secured by an 8-foot high locked gated fence topped with barb wire strands, the Board finds that the proposed expansion will not endanger the health and safety of workers and residents in the community and will not substantially impair or prove detrimental to neighboring properties.

- (b) Public utility buildings in any permitted residential zone, shall, whenever practicable, have the exterior appearance of residential buildings and shall have suitable landscaping, screen planting and fencing, wherever deemed necessary by the board.*

The existing facility is located in a remote location that is not visible from any public road or adjoining property. Adding landscaping, screen planting and/or fencing in this particular case, would be unnecessary.

- (c) Reserved.*
- (d) Any proposed broadcasting tower shall have a setback of one foot from all property liens for every foot of height of the tower; provided, that any broadcasting tower lawfully existing on September 1, 1970, shall be exempt from the setback limitations imposed by this subsection, and may be continued, structurally altered, reconstructed or enlarged; provided further, that no structural altered, reconstructed or enlarged; provided further, that no structural change, repair, addition, alteration or reconstruction shall result in increasing the height of such tower above the then existing structurally designed height.*

The proposed modification of the height of an existing monopole is not a broadcasting tower.

- (e) Examples of public utility buildings and structures for which special exceptions are required under this section are buildings and structures for the occupancy, use, support or housing of switching equipment, regulators, stationary transformers and other such devices for supplying electric service; radio or television transmitter towers and stations; above ground pipelines. Additional standards for telecommunication facilities are found in subsection (i).*

This criterion is not applicable to this petition.

- (f) *The provisions of section 59-G-1.219(a) shall not apply to this subsection. In any residential zone, overhead electrical power and energy transmission and distribution lines carrying in excess of 69,000 volts, where the board finds, etc.*

This criterion does not apply to this petition.

- (g) *In addition to the authority granted by section 59-G-1.22, the Board may attach to any grant of a special exception under this section other conditions that it may deem necessary to protect the public health, safety or general welfare.*
- (h) *Petitions for special exception under this section may be filed on project basis.*
- (i) *A petitioner under this section shall be considered an interested person for purposes of filing a request for a special exception if he states in writing under oath that he has made a bona fide effort to obtain a contractual interest in the subject property for a valid consideration without success, and that he intends to continue negotiations to obtain the required interest or in the alternative to file condemnation proceedings should the special exception be granted.*
- (j) *Any telecommunication facility must satisfy the following standards:*
1. *The minimum parcel or lot area must be sufficient to accommodate the location requirements for the support structure under paragraph (2), excluding the antenna(s), but not less than the lot area required in the zone. The location requirement is measured from the base of the support structure to the property line. The Board of Appeals may reduce the location requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually unobtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any and visibility from the street.*

The subject parcel was determined to be of sufficient size to adequately locate the existing monopole by the Board at the time of the approval at the original exception.

- (2) *A support structure must be located as follows:*
- (a) *In agricultural and residential zones, a distance of one foot from property line for every foot of height of the support structure.*
 - (b) *In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.*
 - (c) *These location requirements apply to perimeter lot lines and not to interior lot lines.*

The proposed 197 foot high monopole will be located 197 feet from the nearest lot line.

- 3) *A freestanding support structure must be constructed to hold no less than 3 telecommunication carriers. The Board may approve a support structure holding less than 3 telecommunication carriers if: 1) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and 2) the Board decided that construction of a lower support structure with fewer telecommunication carriers will promote community compatibility.*

This petition is to increase the number of carriers on the existing monopole from one to three. The proposed monopole will be capable of supporting three carriers.

- (4) *No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.*

No additional signs or illumination are proposed in conjunction with the modification.

- (5) *Every freestanding support structure must be removed at the cost of the applicant when the telecommunication facility is no longer in use by any telecommunication carrier.*

This criterion does not apply to the instant modification request to increase the height of the existing structure.

Based upon the foregoing, the Board finds that the modification of the existing Special Exception can be granted, subject to the following conditions:

1. The petitioner shall be bound by all of its testimony and exhibits of record, the testimony of its witnesses and representations of its attorneys, to the extent that such evidence and representations are identified in the board's opinion granting the special exception modification.
2. All terms of the existing special exception remain in effect, except as modified by the Board of Appeals.
3. Limit the proposed telecommunications facility to 197 feet in height, two additional users of the monopole, a 160 square foot slab for equipment panels and 2,160* cubic feet for the equipment building.

**it was pointed out at the hearing that the original 1,360 cubic feet of the equipment building was mathematically incorrect. The original building is 12x20x9, resulting in a cubic foot limitation of 2,160.*

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Donna L. Barron, Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 15th day of April, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.